IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 833 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KIRIT M BHRAMBHATT

Versus

STATE OF GUJARAT

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Appearance:

1. Special Criminal Application No. 833 of 2001

MR MUKESH R SHAH for Petitioner No. 1

MR KT DAVE APP for Respondents

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CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 24/10/2001

ORAL JUDGEMENT

1. Rule. Mr. K.T. Dave, learned APP appears and waives the service of notice of rule on behalf of the respondents.

2. In this petition filed under Article 226/227 of

the Constitution, petitioner challenges the order dated August 7, 2001 passed by respondent No.3, Special Inspector General of Police, Ahmedabad Range, Ahmedabad, by which he has directed to reinvestigate the offence registered with Anand Rural Police Station vide CR No.II-3031 of 2000 on the basis of the complaint filed by one Jayantibhai Ramanbhai Patel against the petitioner for the commission of alleged offence under sections 504 and 506 of the Indian Penal Code ('IPC' for short) on March 31, 2000. The said complaint was investigated by the police officers of the Anand Rural Police station and since no offence was divulged against the petitioner on investigation, investigating officer, submitted an application on April 26, 2000 under section 173 of the Code of Criminal Procedure ('the Code' for short) before the learned Judicial Magistrate, First Class, Anand and prayed for C summary. The learned JMFC Anand issued notice to the complainant on the report submitted by the investigating officer. The complainant appeared before the learned JMFC, Anand and gave pursis to the effect that he has no objection if C Summary as prayed for is granted. Thereafter the JMFC Anand vide order dated May 1, 2001 granted C summary as prayed for.

3. It is the case of the petitioner that he is due for promotion as Deputy Superintendent of Police and 17 juniors to him are already promoted. It is contended that in view of the fact that respondent No.3 is opposing him due to personal enmity because of earlier proceedings and the suit and the Special Civil Application and Criminal Cases, who has not succeeded till date, has passed an order directing respondent No.2 to reinvestigate the case being CR. No. II-3031 of 2000 of Anand Rural Police Station by communication dated August 7, 2001. Respondent No.2, that is, Deputy Superintendent of Police gave an application to the learned Judicial Magistrate, First Class, Anand on August 9, 2001 requesting the learned Magistrate to hand over the investigation papers to him which were submitted before the learned Magistrate at the time when C summary was sought for as he wants to further investigate the case under section 173 (8) of the Code. On the said application, the learned Magistrate passed order on August 17, 2001 observing that police wants to further investigate and, therefore, papers of C summary are to be sent to the police officers and accordingly the said papers are sent to the concerned police station.

4. Thereafter the petitioner submitted an application Ex.14 before the learned Magistrate wherein a prayer is made to quash and set aside the order dated

August 17, 2001 passed by the learned Magistrate by which the papers of C summary are ordered to be sent to the police officers for further investigation.

5. After hearing the learned advocates appearing for the parties, the learned Magistrate passed an order below Ex.14, on October 8, 2001 rejecting the application submitted by the present petitioner by observing that power to further investigate is within the domain of the police department and, therefore, there is no reason to interfere in the said order passed by respondent No.3, Special Inspector General of Police, Ahmedabad Range, Ahmedabad and further observed that the court has not to decide the powers of the police officers in ordering further investigation. In this petition the petitioner has challenged the order dated August 7, 2001 passed by respondent No.3 to which reference is made in earlier paragraph of this judgment.

6. Mr. M.R. Shah, learned advocate for the petitioner, has contended that it is true that police have power to further investigate into an offence in exercise of powers under Section 173 (8) of the Code irrespective of the fact whether charge-sheet is filed or not. He also contended that even the Presiding Judge has also power to order the police to make further investigation in exercise of powers conferred under Section 173 (8) of the Code. However, in the instant case, the said power is exercised by the Special Inspector General of Police, Ahmedabad Range after one year and three months in a case wherein C summary was sought for and granted by the concerned Magistrate after issuing notice to the original complainant who has given no objection for the grant of C summary. Therefore, according to him, the power exercised by respondent No.3 is wrongly exercised as it is passed with a view to see that the petitioner does not get promotion.

7. In support of the aforesaid contention he cited the following judgments:

1) K. Ramasubbu v. The State and another, 1988 Cri.L.J. 214.
2) Namasivayam v. State, 1982 Cri.L.J. 707.
3) T.T. Antony v. State of Kerala, AIR 2001 SC 2637.

On the aforesaid premise, he urged to quash and set aside the order dated August 7, 2001 passed by respondent No.3 herein by which reinvestigation of CR No.II-3031 of 2000 is ordered.

7. Mr. K.T. Dave, learned APP who appears on behalf of the respondents, has opposed the petition by filing the affidavit in reply sworn by respondent No.3 wherein inter alia he tried to justify the order dated August 7, 2001 by saying that the police have power to order further investigation even after granting of C Summary in a given case. He contended that power under Section 173 (8) of the Code is unfettered and it can be exercised at any stage even after acceptance of the final report and closure of the case. In support of the aforesaid submission, Mr.Dave placed reliance on the following judgements:

1) Union Public Service Commission v. S. Papaiah, (1997) 7 SCC 614.
2) Randhir Singh Rana v. State (Delhi Administrtion) (SC) 1997 (2) GLR 1709.

On the aforesaid premise he contended that respondent No.3, Special Inspector General of Police, Ahmedabad Range, Ahmedabad has exercised the powers under Section 173 (8) of the Code and vide order dated August 7, 2001 fresh investigation is ordered. The said order is in accordance with law passed purely on merit of the case and the petitioner has no right to challenge the said order. He further submitted that the order itself is self-explanatory which cannot be quashed and set aside in a petition filed under Article 226/227 of the Constitution and the petition deserves to be dismissed.

8. At the outset be it stated that so far as the facts of the case are concerned, there is no dispute about the fact that against the present petitioner a complaint for commission of alleged offence under sections 504 and 506 of the IPC was registered on the basis of the complaint filed by one Jayantibhai Ramanbhai Patel with Anand Rural Police station vide CR No.II-3031 of 2000. The said complaint was investigated and during the investigation it was divulged that no offence as alleged has taken place and, therefore, investigating officer sought for C summary by forwarding the papers of investigation before the learned JMFC Anand and the learned Magistrate issued notice to the complainant who gave a pursis to the effect that he has no objection if C summary as prayed for is granted and thereupon by order dated May 1, 2001 the JMFC, Anand granted C summary and accordingly the chapter was closed.

9. Now with the impugned order dated August 7, 2001, respondent No.3 has ordered to reinvestigate the said

case on the following grounds which are stated in the said order:

1) The investigating officer has not collected any evidence with respect to the land situated at Salatvada, Baroda.
2) Though the threat was received by the complainant on his mobile telephone, from which telephone number the threat was given is not investigated.
3) The investigating officer has not tallied the signature to confirm as to whether the same person has signed on the complaint as well as in the Court.
4) Procedure of progress report dated April 19,2000 was not proper.
5) If the complaint is false B summary should have been prayed for instead of that C summary has been sought for.
6) The visiting officer has visited the premises only on two occasions, on April 1, 2000 and April 17, 2000, instead of visiting continuously.

10. So far as the powers under section 173 of the Code is concerned, it would be advantageous to refer to sub-section (8) of Section 173 which is relevant for our purpose in this case, reads as under:

"173. Report of police officer on completion of investigation.
(1) xxxxxx
(2) xxxxxx
(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)".

Therefore, there is no manner of doubt that power under Section 173 (8) of the Code is unfettered and an officer can certainly collect further evidence suo motu at his

instance as well as on the order passed by the Court in this regard.

11. Now the question which falls for determination in this case is as to whether power exercised by respondent No.3, when the original complainant has no objection against granting C summary as prayed for by the investigating officer and that too after a period of one year and three months after granting of the C Summary, is in accordance with law or not?

12. In the case of UPSC (supra) before the Supreme Court, the final report was submitted by the investigating agency after reinvestigation of the case but the shortcomings necessitating reinvestigation pointed out to the investigating agency by the informant (UPSC) were not brought to the notice of the Court while resubmitting the final report. In these circumstances, the Supreme Court held that acceptance of the final report and closure of the case by the Magistrate was bad and withholding of such vital information creates a doubt about the fairness of the investigation.

13. It would be advantageous to refer to paragraphs 12 and 13 of the judgment delivered by the Supreme Court in UPSC's case (supra):

"12. The appellant had communicated to the Director, CBI certain defects in the investigation on 23.1.1995 and had pointed out as many as six shortcomings necessitating reinvestigation but the CBI did not bring that fact to the notice of the Vth Metropolitan Magistrate while submitting the final report on 24.2.1995 before the Magistrate decided to accept the final report submitted by the CBI and closed the file on 16.3.1995. It was, to say the least, improper on the part of the investigating officer of the CBI to have withheld a vital document dated 23.1.1995, addressed to the Director, CBI which communication in our view was in the nature of a "protest petition", from the learned Magistrate while resubmitting the report on 24.2.1995. In all fairness, the investigating agency should have brought that communication to the notice of the learned Metropolitan Magistrate before resubmitting the final report for its acceptance. The withholding of vital information from the learned Metropolitan Magistrate while resubmitting the final report along with various documents on 24.2.1995, for reasons best known to

the investigating officer, has created a doubt in our minds about the fairness on the part of the investigating officer while undertaking the investigations. Had the contents of the communication of the appellant dated 23.1.1995 been brought to the notice of the learned Magistrate, the possibility that he may not have agreed to drop the proceedings cannot be ruled out. This "lapse", deliberate or inadvertent, also renders the order of 16.3.1995 bad.

13. The appellant brought the contents of his communication dated 23.1.1995 to the notice of the learned Metropolitan Magistrate through its Miscellaneous Petition No.2040 of 1995 seeking "reinvestigation" but the learned Magistrate, rejected the petition vide order dated 4.11.1995 observing that "rightly or wrongly that Court had passed an order and it had no power to review the earlier order". Here again the learned Magistrate fell into an error. He was not required to "review" his order. He could have ordered "further investigation" into the case. It appears that the learned Metropolitan Magistrate overlooked the provisions of section 173 (8) which have been enacted to take care of such like situation also. That provision reads:

"173.(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

The Magistrate could, thus in exercise of the powers under section 173 (8) CrPC direct the CBI to "further investigate" the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the "new" report to be submitted by the

> investigating officer would be governed by sub-sections (2) to (6) of Section 173 CrPC. The learned Magistrate failed to exercise the jurisdiction vested in him by law and his order dated 4.11.1995 cannot be sustained."

Thus the Supreme Court has held that the Magistrate can, in exercise of powers conferred under section 173 (8) of the Code, direct the CBI to further investigate and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the investigating officer would be governed by sub-sections (2) to (6) of section 173 of the Code. The learned Magistrate has failed to exercise the jurisdiction vested in him by law and hence his order dated November 4, 1995 cannot be sustained.

14. In my view, the judgment of the Supreme Court in the UPSC's case (supra) relied on by Mr. Dave is of no assistance to justify the order dated August 7, 2001 passed by respondent No.3. In the case before the Supreme Court, the original complainant had brought to the notice of the investigating agency certain defects but investigating agency had not brought the said facts before the learned Magistrate which has resulted into closure of the case by the learned Magistrate. The said order was sought to be reviewed by the original complainant. The learned Magistrate refused to review the said order by saying that he has no power to review the earlier order. Therefore, in the case before the Supreme Court the complainant was very much interested in prosecuting his case and in his absence the order of closure of the case was passed. So far as the instant case is concerned, the complainant has given no objection for granting C summary by filing pursis. The six grounds stated in the said order are irrelevant for the purpose of ordering reinvestigation in respect of the allegations levelled in the complaint made by Jayantibhai Ramanbhai Patel. As per his complaint, he was given threat on telephone and the investigating officer, on the basis of the evidence collected, came to the conclusion that no offence as alleged by the complainant has been committed by the petitioner.

15. Similar question arose before the Supreme Court in T.T. Antony's case (supra). In the said case the Supreme Court was concerned with fresh investigation on the basis of the second FIR. In the said case, the Supreme Court has held that a just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the

police to investigate a cognizable offence has to be struck by the Court. There cannot be any controversy that sub-section (8) of Section 173 Cr.P.C. empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2), Cr.P.C. It would clearly be beyond the purview of sections 154 and 156, Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case. A case of a fresh investigation based on the second or successive FIRs, not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under section 173 (2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482, Cr.P.C. or under Article 226/227 of the Constitution.

16. The sum and substance of the ratio laid down by the Supreme Court in the aforesaid case is that there is no controversy that sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the concerned Magistrate. However, the Supreme Court has cautioned that the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173 (2) of the Code.

17. In the light of the aforesaid judgment of the Supreme Court, if we examine the case on hand, it is clear that in the instant case there is no second FIR but after filing final report by the investigating officer before the concerned Magistrate by which C summary was prayed for, as no incriminating evidence was divulged against the petitioner during the investigation, which was granted by the learned Magistrate vide order dated May 1, 2000 after issuing notice to the original complainant/informant who has also given no objection by passing a pursis in that regard and the case was closed by the learned Magistrate, is it permissible for

respondent No.3 to order fresh investigation on the grounds stated in the impugned letter and that too without any complaint being made by the original complainant/informant. The answer to the aforesaid question obviously would be in the negative. Respondent No.3 ought not to have exercised his power when the case is closed by complying all formalities including no objection given by the complainant by filing a pursis and more particularly when the offence alleged to have been committed by the petitioner is under sections 504 and 506 of IPC which are compoundable. Therefore, in my view, the action on the part of respondent No.3 is nothing but initiating second FIR in respect of same incident under the guise of fresh investigation in a concluded case and that too after a period of one year and three months.

18. It is also required to be noted that the case was concluded by the learned Magistrate by granting C Summary as prayed for vide order dated 1.5.2000 and the order impugned was passed on August 7, 2001, that is, after a period of one year and three months. What earthly reason is there for respondent No.3 to pass the order after one year and three months is not forthcoming in his reply affidavit. Respondent No.3 has tried to justify his order for further investigation saying that the investigation was not conducted in the manner in which it ought to have been conducted and the investigating officer had not investigated with regard to the land situated at Salatvada, had not collected the telephone number from which the threat was received by the complainant on his mobile telephone and whether the signatures were tallying or not, C summary was wrongly prayed for as, if the complaint was false, B summary ought to have been prayed for and the visiting officer had not visited continuously. In my view, all the above are irrelevant factors for reopening the investigation in a concluded case.

19. On having perusal of the final report submitted under Section 173 of the Code by the investigating officer, it is seen that the investigating officer has in unequivocal terms stated in his report that on having perusal of the further statement of the complainant it is seen that there was no threat given by the petitioner nor any abusive language was used by him. It is also stated therein that the complainant has stated in his further statement that it might be possible that someone else might have phoned in the name of the petitioner and as the person shouted in loud voice, the complainant also got excited and on such excitement he lodged the complaint. It may be noted that the report made by the

investigating officer was subjected to the scrutiny of higher officers and higher officers have also not objected to seeking for C summary on the basis of the report made by the investigating officer.

20. It may be noted that on the basis of the order dated August 7, 2001 passed by respondent No.3 which is impugned in the petition, the Deputy Superintendent of Police submitted an application before the learned JMFC Anand, praying therein that the papers of police investigation wherein C summary has already been granted may be returned for further investigation under Section 173 of the Code. In the said application the learned Magistrate had passed only one line order on August 17, 2001 saying that the police wants to further investigate and therefore papers be sent to the concerned police officer for further investigation. After the aforesaid order was passed, the petitioner moved an application before the learned Magistrate wherein he prayed that before sending the papers to the police, he should be heard by the learned Magistrate. The learned Magistrate, vide order dated October 8, 2001 rejected the said application observing that the Court has not examined the powers of police officers with respect to further investigation and, therefore, the Court cannot refuse to return the papers of the police investigation which are asked for by the police officer. However, the learned Magistrate has observed that the order granting C summary has become the record of the case and the police is not entitled to receive the said record back. The sum and substance of the said order is that the learned Magistrate has not reviewed the order of granting C summary but he has ordered to return the police investigation papers without expressing any opinion on the grant of C summary. In view of the aforesaid state of affairs, I am of the opinion that the order passed by the learned Magistrate granting C summary has become final and without questioning the said order in an appropriate forum respondent No.3 cannot reopen the said case in exercise of powers under Section 173 (8) of the Code.

21. The sum and substance of the aforesaid discussion is that the police have power under section 173 (8) of the Code to make further investigation, obtain further evidence both oral and documentary and forward a report or reports to the Magistrate if the case before the Magistrate or Court has not been concluded. Even in a case where the case is concluded by accepting the summary without informing the original complainant/informant or without giving audience to him or to raise his objection,

the case can be reopened for further investigation after getting order from the Court concerned which has granted the summary. In other words, the learned Magistrate before whom any type of summary is prayed for in favour of the original accused cannot proceed with the hearing of the summary without informing the original complainant/informant and if proceeded and passed any order without informing the complainant/informant, the same is liable to be quashed and set aside at the instance of the proceeding initiated by the original complainant/informant.

22. It may be appreciated that the order does not question the supervisory function of the Special Inspector General of Police, respondetn No.3, but due to the aforesaid reasons, the order cannot be sustained.

23. On overall view of the matter, the order passed by respondent No.3 on August 7, 2001 is liable to quashed and set aside on the following premises:

(i) During the investigation made by the officer of the concerned police station no incriminating evidence is collected against the petitioner and therefore C summary was prayed for.

(ii) Before recording C summary, the learned Magistrate had issued notice to the original complainant/informant who had also endorsed to the granting of C summary by expressing no objection by submitting a pursis in that regard and thereafter the learned Magistrate has granted C summary as prayed for and thereby closed the complaint against the petitioner.

(iii) The order for reinvestigation of the said case without any objection being raised by the original complainant/informant or making his grievance against the investigating officer was uncalled for.

(iv) The order is passed after a period of one year and three months from the date of closure of the case when the original complainant had expressed no objection for granting C summary by filing a pursis to that effect.

(v) The offence alleged to have been committed by the petitioner is punishable under sections 504 and 506 of the IPC which is compoundable.

24. Seen in the above context, the order dated August 7, 2001 passed by respondent No.3, which is impugned in this petition, by which he has ordered reinvestigation of the case in which C summary has already been granted about one year and three months ago, is liable to be quashed and set aside.

25. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order dated August 7, 2001 passed by respondent No.3 ordering reinvestigation into CR No.II-3031 of 2000 registered with Anand Rural Police Station is quashed and set aside. Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

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